

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.5 Terms Used in the CSC Act

O. “Mentally Incapable”

Insert the following text on page 85 before the last full paragraph in this subsection:

A victim may be “mentally incapable” of fully understanding the nonphysical factors involved in sexual conduct with a defendant even though the victim demonstrated his comprehension of the physical nature of the sexual relationship between himself and the defendant, as well as an “awareness of the events as they occurred.” *People v Cox*, ___ Mich App ___, ___ (2005), citing *People v Breck*, 230 Mich App 450, 455 (1998). In *Cox*, the defendant was convicted of two counts of CSC-3 for engaging in prohibited conduct with a “mentally incapable” seventeen year old. The defendant argued that the victim could not be considered “mentally incapable” because “the victim attended school, was able to perform automotive repairs, could hold conversations and maintain relationships with people, and could choose his sexual partner.” The Court disagreed. According to the Court, “ample evidence” was presented at trial to support a finding that the victim was “mentally incapable” of consenting to the sexual relationship with the defendant:

“The victim’s Family Independence Agency caseworker testified that the victim was not ready to live on his own and that he was easily manipulated and persuaded to do things that he probably would not do without another’s influence.

* * *

“A psychologist who examined the victim testified that he had a significant history of abuse and neglect, and was mentally deficient, functioning in the ‘borderline’ range of intelligence,

which is a step below ‘below average’ and a step above ‘mental retardation.’ . . . [The psychologist] characterized the victim as a ‘pretty immature individual,’ and opined that even though the victim ‘certainly . . . knew what was proposed’ and was aware of his conduct, he could not appreciate the social or moral significance of his acts relating to the homosexual encounter with defendant, and was incapable of making an informed decision about sexual involvement.

“A counselor . . . described [the victim] as impressionable, very susceptible to manipulation by others, and characterized him as a follower. . . . [The counselor] stated that the victim’s need for acceptance is so great that he gravitates to anyone who will pay attention to him, and cannot distinguish whether a person is being genuine in their [sic] actions.” *Cox, supra* at ____.

The defendant also argued that there was insufficient evidence in support of finding that he “knew or had reason to know” that the victim was mentally incapable. The *Cox* Court, citing *People v Davis*, 102 Mich App 403, 406–407 (1980), explained that the language used in MCL 750.520d(1)(c)—“knows or has reason to know”—functions only to “eliminate liability where the mental defect is not apparent to reasonable persons.” *Cox, supra* at ____, quoting *Davis, supra* at 407. According to the *Cox* Court, sufficient evidence was presented to refute the defendant’s claim:

“[S]everal witnesses testified that the fact that the victim was mentally deficient is readily noticeable after only a short period of interaction. The psychologist opined that a reasonable person could discern within an hour that the victim has a mental defect, because the victim has inarticulate language, difficulty understanding words, and does not make inquiries typical of a seventeen-year-old.” *Cox, supra* at ____.

The *Cox* Court also noted that the defendant had “ample opportunity to notice [the victim’s] limitations.” Evidence showed that the victim had visited the defendant’s home on five to ten occasions, and that the defendant went to see the victim at the victim’s foster home.

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the July 2005 update to page 364:

A non-testifying serologist's notes and lab report are "testimonial statements" under *Crawford v Washington*, 541 US 36 (2004). *People v Lonsby*, ___ Mich App ___, ___ (2005). In *Lonsby*, a crime lab serologist who did not analyze the physical evidence testified regarding analysis that was performed by another serologist. The testimony included theories on why the non-testifying serologist conducted the tests she conducted and her notes regarding the tests. In *Crawford*, "the Court stated that pretrial statements are testimonial if the declarant would reasonably expect the statement will be used in a prosecutorial manner and if the statement is made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Lonsby, supra* at ___, quoting *Crawford, supra* at 51–52. The Court of Appeals found that because the serologist would clearly expect that her notes and lab report would be used for prosecutorial purposes, the information satisfies *Crawford*'s definition of a "testimonial statement." The *Lonsby* Court stated:

"Because the evidence was introduced through the testimony of Woodford, who had no first-hand knowledge about Jackson's observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-examination, to challenge the objectivity of Jackson and the accuracy of her observations and methodology. Moreover, because Woodford could only speculate regarding Jackson's reasoning, defendant could not question or attack Jackson's preliminary test results or the soundness of her judgment in failing to conduct additional tests. Therefore, the introduction of Jackson's hearsay statements through the testimony of Woodford falls squarely within *Crawford*'s prohibition of testimonial hearsay that is reasonably expected to be used by the prosecution at trial. Because there is no showing that Jackson was unavailable to testify and that defendant had a prior opportunity to cross-examine her, the admission of the evidence violated defendant's Confrontation Clause rights, as defined by the United States Supreme Court in *Crawford*." [Footnotes omitted.] *Lonsby, supra* at ___.